

Response: The Councils believe that the contracting officer negotiates a fair and reasonable profit or fee for each acquisition based upon the effort and risk associated with that acquisition. Consequently, it would not be appropriate to encourage the use of or set a minimum base-fee rate, since the establishment of base fee is subject to negotiation and the specific circumstances of each acquisition.

15. Eliminate Requirement Relative to Completing a Determination and Finding

Comment: One respondent wrote that the requirement in the interim rule for a determination and finding (D&F) was redundant with other FAR requirements and increases the workload of overburdened contracting officers without providing any value added. The respondent recommended deleting this requirement in the final rule.

Response: The Councils appreciate the respondent's concern for the contracting officer's workload but disagree with eliminating this requirement from the final rule. The completion of the D&F and Head of Contracting Agency approval satisfy the requirements in section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364) and section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) to establish the appropriate approval level for using award-fee contracts. They are also necessary to ensure that the suitability factors to use an award-fee contract are properly addressed and documented because of the large investment of resources required to administer an award-fee contract.

C. Regulatory Planning and Review

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

D. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule largely covers a broad range of aspects of award-fee contracting, whose upshot will be a more consistent use and administration of award fees

Governmentwide which will provide a small benefit to all entities both large and small. In addition, the changes promulgated in this final rule do not directly affect the current business processes of Federal contractors. In the matter of the rule's prohibition on the rollover of unearned award fee, the Councils believe this will have a negligible impact on small businesses for the following reasons. First, award-fee contracts are largely the province of large businesses with large dollar contracts. Second, the ability to roll over unearned award fee may have caused evaluators in the past to be more conservative in their ratings because of their awareness that contractors may have a second opportunity to earn unearned award fees.

E. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Part 16

Government procurement.

Dated: September 21, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Accordingly, the interim rule published in the **Federal Register** at 74 FR 52856 on October 14, 2009, is adopted as a final rule with the following changes:

PART 16—TYPES OF CONTRACTS

■ 1. The authority citation for 48 CFR part 16 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

16.401 [Amended]

■ 2. Amend section 16.401 by—

■ a. Removing from paragraph (e)(2) the words “performance is” and adding “performance in the aggregate is” in its place each time it appears (twice);

■ b. Removing from Table 16-1 that follows paragraph (e)(3)(iv) the words “contract as” and adding “contract in the aggregate as” in its place each time it appears (five times); and

■ c. Removing from paragraph (e)(3)(v) the words “performance is” and adding “performance in the aggregate is” in its place.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 19

[FAC 2005-46; FAR Case 2009-020; Item V; Docket 2010-0103, Sequence 1]

RIN 9000-AL68

Federal Acquisition Regulation; Offering a Construction Requirement— 8(a) Program

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing a final rule amending the Federal Acquisition Regulation (FAR) to revise FAR subpart 19.8, Contracting with the Small Business Administration (The 8(a) Program), to conform to the Small Business Administration (SBA) regulations. The FAR Council did not publish this rule for comment because this change will not have a significant effect beyond the internal operating procedures of the Government and will not have a significant effect on contractors or offerors. Furthermore, this requirement has existed in the Small Business Administration Regulations since January 1, 2009, and the FAR is being updated to conform to these regulations. This revision changes the location for submitting offering letters to SBA for a construction requirement for which a specific offeror is nominated and impacts internal procedures that the contracting officer is now required to follow.

DATES: *Effective Date:* October 29, 2010

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Karlos Morgan, Procurement Analyst, at (202) 501-2364. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-46, FAR case 2009-020.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the FAR to revise FAR 19.804-2(b) to conform to the SBA regulation 13 CFR 124.502(b)(3). The current FAR requires sole source offerings for construction

requirements be submitted to the SBA District Office for the geographical area where the work is to be performed. However, the SBA regulation requires the offering letters for sole source requirements offered on behalf of a specific participant be submitted to the SBA district office servicing that concern.

This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501-3(a) and 41 U.S.C. 418b, and publication for public comments is not required.

The Councils will consider comments from small entities concerning the existing regulations in the part affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-46, FAR Case 2009-020) in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. chapter 35, *et seq.*

List of Subjects in 48 CFR Part 19

Government procurement.

Dated: September 21, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 19 as set forth below:

PART 19—SMALL BUSINESS PROGRAMS

■ 1. The authority citation for 48 CFR part 19 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 19.804-2 by—

- a. Revising paragraph (b)(1); and
- b. Redesignating paragraph (b)(2) as paragraph (b)(3); and adding a new paragraph (b)(2).

■ The revised and added text reads as follows:

19.804-2 Agency offering.

* * * * *

(b)(1) An agency offering a construction requirement for which no specific offeror is nominated should submit it to the SBA District Office for the geographical area where the work is to be performed.

(2) An agency offering a construction requirement on behalf of a specific offeror should submit it to the SBA District Office servicing that concern.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 23 and 52

[FAC 2005-46; FAR Case 2009-028; Item VI; Docket 2010-0097, Sequence 1]

RIN 9000-AL64

Federal Acquisition Regulation; Encouraging Contractor Policies To Ban Text Messaging While Driving

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order 13513, issued on October 1, 2009, entitled “Federal Leadership on Reducing Text Messaging while Driving.” This Executive Order was issued to demonstrate Federal leadership in improving safety on the nation’s roads and highways, and to enhance the efficiency of Federal contracting. The purpose of this policy is to prevent the unsafe practice of text messaging by Federal contractors while driving in connection with Government business. This policy further promotes economy and efficiency in Federal procurement, and seeks to prohibit the disruption of Government business and Federal procurement, as a result of unsafe text messaging practices.

DATES: *Effective Date:* September 29, 2010.

Applicability Date: The rule applies to solicitations issued and contracts awarded on or after September 29, 2010.

However, contracting officers are encouraged to modify existing contracts, in accordance with FAR 1.108(d)(3), to include the FAR clause.

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before November 29, 2010 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005-46, FAR Case 2009-028, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009-028” under the heading “Enter Keyword or ID” and selecting “Search.” Select the link “Submit a Comment” that corresponds with “FAR Case 2009-028.” Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2009-028” on your attached document.

- *Fax:* 202-501-4067.

- *Mail:* General Services

Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, *Attn:* Hada Flowers, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-46, FAR Case 2009-028, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. William Clark, Procurement Analyst, at (202) 219-1813. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-46, FAR Case 2009-028.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule revises the Federal Acquisition Regulation to implement Executive Order 13513, issued on October 1, 2009 (74 FR 51225, October 6, 2009), entitled “Federal Leadership on Reducing Text Messaging while Driving.”

Text messaging while driving causes drivers to take their eyes off the road and at least one hand off the steering wheel, endangering both themselves and others. In order to implement the Executive order, this interim rule creates a new subpart in FAR part 23 and an associated clause to encourage Federal contractors and subcontractors to adopt and enforce policies that ban text messaging while driving—